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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,

v.

FRANCES B. DAVIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE FOR INDEPENDENT COLLEGES AND UNIVERSITIES, THE ASSOCIATION OF AMERICAN UNIVERSITIES, THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND THE ASSOCIATION OF GOVERNING BOARDS AS *AMICI CURIAE* URGING REVERSAL

RICHARD A. FULTON
DAVID M. DORSEN
SACHS, GREENEBAUM & TAYLER
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 872-9090

Attorneys for the National Institute for Independent Colleges and Universities, the Association of American Universities, the American Association of State Colleges and Universities, and the Association of Governing Boards

Of Counsel:

CHRISTINE YOUNG TOPPING
1717 Massachusetts Ave., N.W.
Washington, D.C. 20036

THOMAS HYLDEN
1620 Eye Street, N.W.
Washington, D.C. 20006

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INTERESTS OF THE AMICI CURIAE

The National Institute for Independent Colleges and Universities ("NIICU"), the Association of American Universities ("AAU"), the American Association of State Colleges and Universities ("AASCU"), and the Association of Governing Boards ("AGB"), are non-profit membership organizations whose members comprise a broad spectrum of American higher education, public and private, graduate and undergraduate. (Copies of letters from

the parties consenting to the amici filing this brief have been filed with the Clerk of the Court.)

NIICU's membership consists of approximately 800 independent, non-public colleges and universities. AAU's membership consists of sixty public and private universities with major post-graduate, professional, and research programs. AASCU's membership consists of 325 state assisted colleges and universities. AGB's membership consists of representatives from the governing or advisory boards of about 1,250 colleges and universities.

The amici and their members completely support equal rights and equal opportunity for handicapped persons, as well as the policies and purposes underlying the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* (Supp. V, 1975), as amended ("the Act"). In particular, the amici support the policy of nondiscrimination against the handicapped as embodied in section 504 of the Act, 29 U.S.C. § 794 (Supp. V, 1975).[1] The amici's member

[1] Section 504, as amended, provides in full:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress and such regulation may take effect no earlier than the thirteenth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794 (Supp. V, 1975), as amended by the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2982 (1978).

colleges and universities look forward to and do work internally, with each other, with handicapped students, and with appropirate state and local vocational rehabilitation agencies in a genuine effort to make equal access and opportunity a reality for handicapped persons.[2] The amici are concerned, however, that some interpretations of Section 504, such as that of the court of appeals below, have gone beyond equal opportunity and nondiscrimination in a way not intended by Congress and in a way that could have a significant adverse impact on higher education.

The Court's interpretation of the meaning of section 504 in this case will affect significantly the rights and obligations of all federal financial aid recipients. Because substantially all the amici's member institutions benefit from such aid in one form or another, they have a strong interest in the reasoned interpretation of section 504.

Specifically, the amici are concerned that the decision under review, *Davis v. Southeastern Community College,* 574 F.2d 1158 (4th Cir. 1978) goes beyond the meaning of and purpose behind section 504 in at least two ways:

(1) by requiring institutions of higher education to admit a handicapped person to a particular educational program even where the effects of the handicap render that person unqualified to perform or participate in the essential academic and technical requirements of the program; and

[2] *See, e.g.*, G. Biehl, Guide to Section 504 Self-Evaluation for Colleges and Universities (undated) (manuscript developed by the Bureau of Education for the Handicapped, Office of Civil Rights, Department of Health, Education and Welfare, in conjunction with (and published by) the National Association of College and University Business Officers and the American Council on Education).

(2) by holding that institutions of higher education may be required to modify essential requirements of their academic programs and to provide special services to individual handicapped persons without regard to the costs of the services.

QUESTIONS ADDRESSED BY THE AMICI

1. Whether Section 504 of the Rehabilitation Act of 1973 requires an institution of higher education to admit a handicapped person to a particular educational program when the effects of the handicap render that person unqualified to perform or participate in the essential requirements of the program?

2. Whether Section 504 requires an institution of higher education to modify essential requirements of an educational program or to provide costly special services in order to compensate for the disability of a particular handicapped student?

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. §794 (Supp. V, 1975) provides in pertinent part:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

I. The plain meaning of section 504 supports the district court's interpretation that a handicapped individual is otherwise qualified for admission to a program of higher education if she is able to perform the essential requirements of the program in spite of her handicap. In a case where the effects of a person's handicap directly preclude her from performing essential program requirements, to hold as did the court of appeals that qualifications must be assessed without regard to handicap is to ignore Congress's use of the word "qualified." Further, the statute's use of the phrase "solely by reason of his handicap" supports the district court's interpretation because it clearly suggests that the effects of a handicap can be among the factors considered. Indeed, the court of appeals conceded that the district court had given the statute its "ordinary common meaning." *Davis v. Southeastern Community College*, 574 F.2d 1158, 1160 (4th Cir. 1978).

The legislative history of section 504 and the subsequently enacted Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619, provide no indication that Congress intended institutions receiving federal financial assistance to waive necessary program qualifications in order to accommodate handicapped individuals unable to meet those qualifications. Rather, the purpose of the Act was to eliminate decisionmaking based upon stereotyped notions of the handicapped. That purpose is satisfied when a school accords a handicapped person who statisfies program requirements in spite of her handicap treatment equal to that of any other qualified applicant.

45 C.F.R. §84.4(3)(k) (1978), 42 Fed. Reg. 22678 (1977) defines a "qualified handicapped person," with respect to post-secondary education, as a handicapped person "who meets the academic and technical standards requisite to admission or participation in the recipient's program or activity." In explaining this definition, HEW specifically stated that Congress did not intend "otherwise qualified handicapped person" to "include persons who are qualified *except for* their handicap, rather than *in spite of* their handicap." 42 Fed. Reg. 22686 (1977) (emphasis supplied). The HEW regulations, upon which

the court of appeals purported to rely, thus specifically reject the court of appeals' conclusion.

Sound policy considerations support the conclusion that Congress could not have intended section 504 to eliminate legitimate requirements for admission in cases where the effects of an applicant's disability preclude the applicant from satisfying a particular requirement. Particularly in areas such as nursing, where the clinical requirements of the program directly involve the health and safety of patients with whom the student comes in contact, public policy requires that schools be allowed to examine whether an applicant—whether handicapped or not—satisfies essential program requirements.

The basic policy of nondiscrimination statutes is to remove artificial barriers to, not to eliminate legitimate qualifications for, positions sought. Just as title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, was not intended "to guarantee a job to every person regardless of qualifications," *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), section 504 was not intended to guarantee admission to academic programs regardless of qualifications.

If section 504 is interpreted to require schools to waive educational requirements in cases where a person's particular disability precludes her from satisfying the requirements, the courts will necessarily become involved in the setting of curricula requirements. Just last term, in *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), the Court reviewed the factors underlying deference to educational decisions, concluded that those factors "warn against any such judicial intrusion into academic decisionmaking," and refused to overturn an academic decision to dismiss a medical student for unsatisfactory performance in the clinical portions of her curriculum.

II. A comparison of section 504 with section 503 of the Rehabilitation Act of 1973 shows that the Congress knew how to impose affirmative action requirements with respect to the handicapped and chose not to do so in section 504. Therefore, there is no requirement under section 504 that a school modify essential elements of its academic curriculum or provide, at its own expense, costly special services to accommodate a particular handicapped student.

The overall structure of the Rehabilitation Act, which in subchapters I through III, 29 U.S.C. §§ 701-776, provides federally financed programs to offer services to the handicapped, indicates that Congress did not intend in section 504 (in subchapter V of the Act) to shift the burden of providing such services to general recipients of federal financial assistance. Certainly no such intent appears in the language of section 504, nor in the legislative history, and this Court should not undertake to read into the section such a requirement. To the extent nondiscrimination might in some instances require schools to make reasonable accommodations to handicapped students, the accommodations should not interfere with the essential academic requirements of the school and should not require the school to bear more than *de minimis* minimal costs. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

ARGUMENT

I.

SECTION 504 OF THE REHABILITATION ACT OF 1973 DOES NOT REQUIRE A COLLEGE OR UNIVERSITY RECEIVING SOME FEDERAL FINANCIAL ASSISTANCE TO ADMIT A HANDICAPPED PERSON TO A PARTICULAR EDUCATIONAL PROGRAM WHERE THE EFFECTS OF THE HANDICAP RENDER THAT PERSON UNQUALIFIED TO PERFORM OR PARTICIPATE IN THE ESSENTIAL REQUIREMENTS OF THE PROGRAM.

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, provides in pertinent part:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The first question presented by this case is whether, and to what extent, section 504 permits a federal aid recipient to take into account the nature of an applicant's handicap in deciding whether to admit the applicant to a particular educational program.[3] Although conceding that a school may consider "academic and technical qualifications" in making an admission decision, the court of appeals held that section 504 flatly precludes the school from considering the nature of a person's handicap in deciding whether the person is qualified for admission. *Davis v. Southeastern Community College*, 574

[3]It appears to be undisputed that Respondent is a handicapped person within the meaning of 29 U.S.C. §706(6), that Petitioner is the recipient of some federal financial assistance, and that Respondent was denied admission to Petitioner's Associate Degree Nursing Program.

F.2d 1158, 1160-61 (4th Cir. 1978), *rev'g* 424 F. Supp. 1341 (E.D.N.C. 1976).[4]

While the court of appeals held that section 504 requires a person's qualification's to be considered *"without regard to* her disability", *Id.*, 574 F.2d at 1160 (emphasis supplied), the district court had held that the proper focus is whether the person is able "to function sufficiently in the position sought *in spite of* the handicap, if proper training and facilities are suitable and available." *Id.*, 424 F. Supp. at 1345 (emphasis supplied). Finding from the evidence adduced at trial that Respondent's hearing disability "actually prevents her from safely performing in both her training program and her proposed profession", 424 F. Supp. at 1345,[5] the district court held that Petitioner's decision not to admit Respondent to its registered nurse program was not a violation of section 504. For the reasons given below, the district court's interpretation of the statute was correct, and the court of appeal's construction of section 504 is

[4]The phrase "academic and technical qualifications" was a reference by the court of appeals to 45 C.F.R. §§84.1 *et seq.*, Appendix A, ¶5, 42 Fed. Reg. 22687 (1977), wherein the Department of Health, Education and Welfare ("HEW") states, with reference to postsecondary education programs:

> . . . both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all nonacademic admission criteria that are essential to participation in the program in question.

Although the court of appeals quotes this statement with apparent approval, and although lack of a particular physical handicap obviously could be (as it was found to be in this case) "essential to participation" in a program, it is clear from the rest of the court's opinion that handicap is not to be considered among the technical standards for admission. This point is discussed in more detail in I.C., *infra*.

[5]This finding of the district court was not disturbed on appeal.

contrary to the section's plain meaning, to the legislative history of the Rehabilitation Act of 1973, to the HEW regulations effectuating the section, and to sound public policy considerations.

A. The Plain Meaning of Section 504 Permits an Institution of Higher Education To Consider Whether the Effects of a Particular Person's Handicap Disqualify Her from Admission to a Particular Educational Program.

Section 504 prohibits discrimination against an "otherwise qualified handicapped individual," without defining the phrase. The court of appeals conceded that the district court had given the phrase its "ordinary common meaning" in defining it to mean "otherwise able to function sufficiently in the position in spite of [her] handicap, if proper training and facilities [were] suitable and avialable." *Id.*, 574 F.2d at 1160-61.[6] That the district court's interpretation of the statute is mandated by the plain meaning of the language is clear from the definitions. "Otherwise" means "in other respects", and "qualified" means "fitted for a given purpose." Webster's Third New International Dictionary (1975). Quite clearly, a handicapped person is "in other respects fitted for the given purpose" of an educational program if the person can satisfy the essential requirements of the program in spite of his or her handicap. To construe "otherwise" as meaning "without regard to handicap"—which

[6]The court of appeals' reversal was based not upon analysis of the meaning of the language of the statute, but rather upon the HEW regulations referred to in footnote 4, *supra*, which were promulgated after the district court's decision. In section I.C., *infra*, we show that the court of appeals' analysis of the regulations was incorrect.

would be necessary to affirm the court of appeals decision—would be to read out of the statute the word "qualified". To do so would violate "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Ginsburg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208 (1932). Accordingly, the only reasonable interpretation of section 504 is that, although a handicapped person cannot be considered unqualified simply because of the fact of a handicap, the federal aid recipient nonetheless can consider the mental or physical manifestations of the handicap in deciding if the person is "otherwise qualified."

The above interpretation of the language "otherwise qualified" is supported by Congress's having included in section 504 the phrase "solely by reason of [her] handicap." First, the phrase indicates only that handicap may not be the sole reason for rejection, not that it may not be considered along with other factors. Second, where an applicant is denied admission to a program because the program necessarily requires certain skills which the applicant's handicap precludes, the rejection is not based upon the fact of handicap, but upon the particular manifestations of the handicap taken in conjunction with considerations of the requirements of the program to which the person is seeking admission.

The conclusion that the effects of a person's handicap may preclude him or her from being "otherwise qualified" within the meaning of section 504 is consistent with the conclusion of the only other circuit court specifically to address the question. In *Kampmeier v. Nyquist,* 553 F.2d 296 (2d. Cir. 1977), two junior high school students with vision in only one eye sought a preliminary

injunction barring public school authorities from refusing to allow them to participate in contact sports. In affirming the district court's denial of plaintiff's application for preliminary injunction, the court stated:

> As we read §504, however, exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy. Section 504 prohibits only the exclusion of handicapped persons who are "otherwise qualified." Here the defendants have relied upon medical opinion that children with sight in only one eye are not qualified to play in contact sports because of the high risk of eye injury. The plaintiffs have presented little evidence—medical, statistical, or otherwise—which would cast doubt on the substantiality of this rationale.

Id., 553 F.2d at 299. Accordingly, the plain meaning of the statute allows a federal aid recipient to consider the relationship between mental or physical mainifestations of a person's handicap and the activity to which the person is seeking admission in determining whether the person is "otherwise qualified" for the activity.

B. The Legislative History of the Rehabilitation Act of 1973, as Amended, Does Not Support the Conclusion That a Handicapped Individual Must Be Admitted to a Program Receiving Federal Financial Assistance Without Regard to the Effects of Her Handicap.

Section 504 was initially passed as part of the Rehabilitation Act of 1973, Pub. L. 93-112 (hereinafter "the Act"). There were no hearings on section 504 and it was not the subject of debate during the 93rd Congress. The section is mentioned only twice, and then

briefly, in S.Rep. 93-318, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News, 2076, 2123, 2143. However each passage speaks only in terms of a general prohibition against discrimination and does not define the phrase "otherwise qualified." The very essence of nondiscrimination, however, is that individuals who are similarly situated are to be treated equally. There would be no such equal treatment if handicapped individuals could gain access to programs despite their failing to possess (because of the effects of a handicap) a qualification considered essential to performance or participation in the program, whereas persons who lacked the qualifications for reasons unrelated to handicap (for example, lack of education or experience) would be barred from the program. Such unequal and preferential treatment is not favored. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977); *see generally Regents of the University of California v. Bakke*, 98 S. Ct. 1733 (1978). Thus, although the legislative history of the 1973 Act is scant, it supports the proposition that a handicapped individual, to be eligible for admission to a program receiving federal assistance, must be qualified for the program.

In the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, which amended the definitions of "handicapped individual" appearing at 29 U.S.C. §706(6), Congress significantly did not disturb the phrase "otherwise qualified" in section 504. Prior to the 1974 amendments, "handicapped individual" had been defined for all purposes in terms of a handicapped person's employability or ability to benefit from the vocational rehabilitation services provided for in subchapters I through III of the Act. (Section 504 appears in subchapter V of the Act). The 1974 Amendments retained the old definition

for the purposes of subchapters I through III of the Act. However, for the purposes of subchapters IV and V of the Act, which are not limited to employment and vocational rehabilitation services, the term "handicapped individual" was defined more broadly as a person who actually has a physical or mental impairment that substantially limits one or more of the person's major life activities, or as a person who is perceived as or has a record of having such impairments. 29 U.S.C. §706(6) (Supp. V, 1975). The reason for the amendment is explained thus in the Senate Report:

> It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individual" in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the indiviudal's potential benefit from vocational rehabilitation services under titles I and III (in the case of both sections 503 and 504) of the Act.

S. Rep. No. 93-1297, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373, 6388. It is thus clear from the legislative history that the purpose of the amendments was not to remove the requirement that a person be "otherwise qualified" for the nondiscrimination policy of section 504 to apply, but rather to make the nondiscrimination provision of section 504 applicable in areas where employability might be irrelevant to the particular program receiving federal assistance, or in areas where the program receiving assistance is other than a vocational rehabilitation program.

The fact that the 1974 Amendments' redefinition of "handicapped individual" was not meant to remove the requirement that such an individual be "otherwise qualified" for a particular program receiving aid can be

seen by reference to the following statement in the Senate Report:

> It should also be noted that, although the "employability" confining context of the present Rehabilitation Act section 7(b) definition of "handicapped individual" is removed from the new definition as to section 503 as well as the use of the term elsewhere in titles IV and V, section 503 itself relates solely to employment and thus the adjective "qualified" in modification of "handicapped individual" in that section clearly requires that the "employability" of the handicapped individual in question is a prerequisite to section 503 application.

Id., [1974] U.S. Code Cong. & Ad. News at 6391. Since section 504 is not limited to employment or vocational rehabilitation services, no similar remark had to be made concerning section 504. However, the same reasoning applies. Section 504 relates to participation in federally assisted programs and thus the adjectival phrase "otherwise qualified" in modification of "handicapped individual" in that section clearly requires that the handicapped person be capable of participating in the program as a prerequisite to section 504 application.

The legislative history shows not only that the 1974 amendment did not remove the requirement that a handicapped individual be qualified for a program to which he or she seeks admission, but also that the purpose of section 504 is to ensure that the qualifications of handicapped individuals are measured fairly on an individual basis and not on the basis of invalid, stereotyped notions about the effects of a handicap. This latter purpose of section 504 is apparent from the plain language of the 1974 Amendment's definition of "handicapped individual":

> [S]uch term means any person who (A) has a mental or physical impairment which substantially limits one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment.

29 U.S.C. §706(6) (Supp. V, 1975). The focus, therefore, is to be on the actual *effects* of the handicap on the person's ability to perform, not on the mere *fact* (real or imagined) of handicap. As the Senate Report states,

> [The definition] focuses on substantial limitations of one or more of an individual's major life activities, rather than focusing on handicaps to employment, vocational goals, and prospective benefit from vocational rehabilitation services.
>
> In addition, the proposed definition of "handicapped individual" would include individuals who have a record of that kind of impairment (this would include those who have a record that was in fact a false record; for example, a child who has been classified incorrectly as mentally retarded) and an individual who is regarded as having such a substantial limitation (such as a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning).

S. Rep. 93-1297, *supra*, [1974] U.S. Code Cong. & Ad. News at 6414. The amici submit, therefore, that federal aid recipients are not required to ignore handicap as it may impact upon legitimate and necessary qualifications for a particular program, but rather are required to focus on whether there is a real impairment which actually does preclude the person from meeting the requirements of the program.

C. The HEW Regulations Effectuating Section 504 Clearly Allow an Institution of Higher Education To Deny Admission to a Handicapped Individual Whose Particular Disability Renders Her Incapable of Performing or Participating in the Particular Program for Which She Seeks Admission.

As noted above, the court of appeals' interpretation of section 504 rests neither on the plain meaning of the section nor on its legislative history. Rather the court based its decision on HEW regulations implementing section 504. Although section 504 itself contains no authorization for the promulgation of such regulations,[7] the Secretary of HEW was ordered by the President to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Ex. Order No. 11914, 41 Fed. Reg. 17871 (1976). Regulations subsequently were promulgated and appear at 45 C.F.R. §§84.1 *et seq.*, 42 Fed. Reg. 22676 (1977). To the extent these regulations are consistent with the legislative purpose behind section 504 and are promulgated within the scope of the power delegated HEW by Ex. Order No. 11914, they are entitled to great weight in interpreting the meaning of section 504. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Udall v. Tallman*, 380 U.S. 1 (1965). Accordingly, we turn to an analysis of the regulations as they concern the definitation of "otherwise qualified handicapped individual" and the descriptions of discriminatory practices regarding institutions of higher education.

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[7] Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793, by contrast, specifically requires the President to promulgate regulations to "implement the provisions of this section. . . ."

The general nondiscrimination clause of the regulations provides:

> No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

45 C.F.R. § 84.4(a) (1978); 42 Fed. Reg. 22678 (1977). The phrase "qualified handicapped person" is defined:

> (k) "Qualified handicapped person" means:
>
> (3) With respect to postsecondary and vocational education services, a handicapped person who meets the *academic and technical standards requisite to admission or participation in the recipient's program or activity*.

45 C.F.R. § 84.3(k)(3) (1978), 42 Fed. Reg. 22678 (1977) (emphasis supplied). The section by section analysis of the regulations explains § 84.3(k)(3) as follows:

> [T]he paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

45 C.F.R. § 84.1 *et seq.*, App. A, ¶ 5, 42 Fed. Reg. 22687 (1977).

In the instant case the district court found that communication abilities which Respondent lacked were a necessary requisite to the program to which Respondent sought admission.[8] *Davis v. Southeastern Community*

[8] It is important to note that the nursing program required students to be able to communicate with patients as part of the

[footnote continued]

College, supra, 424 F. Supp. at 1343, 1345-46. In the language of the regulations, communications abilities were a technical standard for participation in the clinical component of the nursing program. The court of appeals' ruling that handicap could not be considered at all in the admission process thus waived one of the "standards requisite to admission or participation in the program" and is clearly contrary to HEW's interpretation of the statute.

The above conclusion is reinforced by the portion of the HEW section by section analysis concerning the definition of "qualified handicapped person":

> Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the

curriculum. This is not a case, therefore, where the handicap hinders the student in *acquiring* the content of the course (*e.g.*, as in listening to a lecture or reading a textbook) but a case where the handicap is an obstacle to the content itself. It also should be noted that Petitioner's determination that Respondent was unqualified was not based upon stereotyped notions of the handicapped, but rather upon a particularized analysis of the Respondent's disability in relation to the requirements of the nursing program. In this connection, the school had Respondent tested by an audiologist, considered his report carefully, consulted with and obtained a report from the Executive Director of the North Carolina Board of Nursing, and submitted all the records for review by a committee of staff nurses. *Id.*, 424 F. Supp. at 1343.

> qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

45 C.F.R. § 84.1 *et seq.*, Appendix A, ¶ 5, 42 Fed. Reg. 22686 (1977). Thus HEW's interpretation of the intent of the statute completely supports that of the district court: "otherwise qualified" means "qualified in spite of handicap," not "qualified without regard to handicap."

That the Congressional intent in enacting section 504 was not to abolish, for handicapped persons only, legitimate program admission and participation standards is reinforced by the HEW comments concerning drug addiction and alcoholism, which may be handicaps. In this connection, the section by section analysis of the regulations provides:

> It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be

> taken into account in determining whether he or she is qualified.
>
> * * *
>
> With respect to other services, the implications of coverage of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

45 C.F.R. §§ 84.1 *et seq.*, App. A, ¶ 4, 42 Fed. Reg. 22682 (1978). What is said above about drug addiction and alcoholism applies with equal logic to other forms of handicap. It is only reasonable to allow a federal aid recipient to take into account the manifestations of a handicap in deciding whether the applicant is qualified for admission to a particular program.

Finally, when HEW later promulgated regulations to coordinate federal agency implementation of section 504, it reiterated its earlier position, outlined above, that section 504 only prohibits discrimination against qualified handicapped persons. 45 C.F.R. § 85.51 (1978), 43 Fed. Reg. 2137 (1978). The term was defined thus:

> "Qualified handicapped person" means (a) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the

> essential functions of the job in question and (b) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services."

45 C.F.R. §85.32 (1978), 43 Fed. Reg. 2137 (1978). That the effects of handicap can be taken into consideration in determining if an individual meets the essential program requirements was made clear by the "supplementary information" issued by HEW to explain the regulations:

> [T]his Department believes that its definition [of "qualified handicapped individual"] more adequately emphasizes the prohibition against deeming a handicapped person to be unqualified on the basis of functions that are not necessary to the successful performance of the job in question.
>
> * * *
>
> The Secretary again wishes to reassure recipients that such considerations [as factors of safety] are appropriate and are not considered a violation of section 504, so long as they are based on facts relating to the individual applicant's qualifications, rather than on assumptions or stereotypes.

43 Fed. Reg. 2134 (1978).[9] It is clear, therefore, that handicap can be considered to the extent it affects an applicant's qualifications to perform functions that are necessary to performance in the program to which she seeks admission. In the instant case, Petitioner reasonably concluded, and the district court so found, that

[9]The above passage also reinforces the conclusion of part I.B., *supra*, that the policy behind section 504 is to eliminate consideration of handicapped individuals based upon stereotyped notions, not to eliminate a school's reasonable qualifications for admission.

Respondent was not fitted for the program to which she applied. The court of appeals erred in holding that handicap could not be considered in determining whether an applicant is qualified.

D. Sound Public Policy Considerations Support the View That Section 504 Permits the Effects of a Person's Handicap To Be Considered in Making an Admission Decision to a Particular Educational Program.

As shown above the public policy underlying section 504 is to eliminate stereotyped notions of the capabilities of handicapped or apparently handicapped individuals as a basis for exclusion from programs receiving federal financial assistance. It would be unfortunate if a statute whose central aim is to eliminate stereotyped decision-making were to be interpreted so as to give rise to an equally harmful generalization that all individuals with a disability are able to perform as if the disability did not exist. Yet this is precisely the result of the court of appeals decision that, in academic admissions cases, the nature or effects of a handicap cannot be considered.

The court of appeals opinion, by prohibiting consideration of the effects of handicap, violates the sound public policy requiring that individuals be qualified for the programs for which they seek admission. The prospective student applying for admission, the institution seeking to educate its students, and the public at large which relies upon the school and its graduates—all have a strong interest that legitimate admissions qualifications be satisfied. What has been said about the necessity of being qualified in the context of employment discrimination on the basis of race and sex is equally pertinent in the

context of educational program discrimination on the basis of handicap:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. . . . What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment. . . .

Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). In the instant case, to consider Respondent for admission without regard to handicap is to consider her without regard to qualifications. On the basis of the evidence below, it cannot be concluded that the clinical requirements of Petitioner's nursing program were artificial, unnecessary or arbitrary. The district court properly considered Respondent's qualifications in light of those requirements and concluded that she was not qualified. Section 504 and important policy considerations require no more.

The policy requiring that an applicant be qualified is particularly strong where admission is sought to programs which involve risks or potential risks to the applicant or to others. The need to balance the degree of risks and the duties owed others in these circumstances clearly necessitates consideration being given to the nature of the individual's handicap. Thus, in *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977), the medical risk to a handicapped student of participation in contact sports was found to be sufficient justification under section 504 for the school to deny such participation. And, in *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972), a title VII defendant was not required to lower its qualification standards for applicants to the position of airline flight officer because of the risks to others:

> [W]hen the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. . . . The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job.

Id., 475 F.2d at 219.

The above policy considerations are applicable to a nursing program which legitimately requires students to perform functions which impact the safety and health of patients with whom they come in contact. In this case, Respondent was not rejected on the basis of artificial or stereotyped notions about the effect of the handicap. Rather, Respondent, like all applicant to the nursing program, was required to undergo a physical examination as a prerequisite to admission. When the examination revealed a hearing disability, Respondent was not summarily rejected. Rather, an in-depth audiological evaluation was performed and, as the record shows, the limitations imposed by the presence of Respondent's hearing disability were carefully compared to the program requirements of the nursing school. Petitioner successfully established below that the particular and necessary requirements of its Associate Degree Registered Nursing program rendered Respondent unqualified to participate because of the particular effects of her disability. The district court specifically found, on the basis of the evidence that "[Respondent's] handicap actually prevents her from safely performing in both her training

program and her proposed profession." *Davis, supra,* 424 F.Supp. at 1345.[10]

If section 504 requires colleges and universities to admit a student without regard to her physical or mental ability (due to handicap) to satisfy the requirements of a particular program to which she is admitted, then either the student later will be dismissed for failure to meet the program's requirements or the school will have to modify or delete its curriculum requirements as to that student. Congress certainly could not have intended, and no policy would require, that schools admit a student without regard to a disability and then dismiss her because of the disability. Nor, the amici submit, did Congress intend to involve itself, the executive,[11] or the judiciary in the determination of what are and what are not reasonable curriculum requirements.

In *Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78 (1978), the Court rejected a

[10]The existence of reasonable educational program requirements which might bar participation due to a particular individual's disability is not limited to graduate or professional programs. For example, undergraduate majors such as dance, physical education, physical therapy and dental hygiene may necessarily require certain physical activity on the part of a student which might be precluded by the student's particular disability.

[11]In this connection, one commentator has noted:

> Most foreign countries have established ministries of education or comparable governmental organs at national, state, or local levels, to oversee their higher educational systems. The situation in the United States, however, is quite different. The federal government has never attempted to vest complete authority over higher education in a single body, and state regulation has been relatively insignificant.

The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation, 52 Corn. L.Q. 104 (1966).

former medical student's claim, based upon procedural and substantive due process grounds, that she had been unlawfully dismissed from medical school for alleged unsatisfactory performance in the clinical rotations. Finding that the decision to dismiss Respondent was an academic one—"rest[ing] on the academic judgment of school officials that she did not have the necessary clinical ability to perform as a medical doctor"—the Court distinguished the case from dismissals based upon disciplinary grounds where more process is due. *Id.*, 435 U.S., at 86. In reaching its decision the Court acknowledged "the significant and historically supported interest of the school in preserving the present framework for academic evaluations" and noted that "[c]ourts are particularly ill equipped to evaluate academic performance." *Id.*, 435 U.S., at 86 n.3, 92.[12]

The same considerations of academic freedom and expertise which prompted the *Horowitz* Court to reject the student's procedural due process attack on her dismissal were applied to reject her substantive due process attack on the merits of the dismissal decision:

> The factors discussed in Part II with respect to procedural due process speak a fortiori here and warn

[12]The Court's deference to educators' setting their own standards and evaluating students was not dicta but a necessary finding in deciding the amount of process which the student is due. This is so because the requirements of due process in a particular situation depend broadly upon a balance of the interest of the decision-maker in the procedure adopted and the interest of the person affected by the decision in greater safeguards. *Goldberg v. Kelly,* 397 U.S. 254, 263 (1970). The Court in *Horowitz* acknowledged the great importance to the student of continuing to pursue her medical education, but concluded that the academic interests of the institution sufficiently outweighed the student's career interest so as to justify the particular procedures used by the school in dismissing her. 435 U.S., at 86, n 3.

> against any such judicial intrusion into academic decision making.

Id., 435 U.S., at 92 (footnote omitted).

Both student evaluation and determination of curriculum content are academic decisions requiring the expertise and experience of the educator. Accordingly, the traditional judicial deference accorded to evaluation of academic performance logically should extent to decisions relating to the specifications of an academic program.[13] In this case the district court necessarily had to find that the clinical requirements of Petitioner's nursing program were reasonable and necessary to the nursing curriculum, since it defined "otherwise qualified" to mean that the person must be "able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are available." 424 F. Supp. at 1345. The reasonableness of a clinical component in a nursing program and the wisdom of allowing the school to determine if the student can satisfy the component is underscored by Mr. Justice Powell's observation in *Horowitz* that:

> [I]t is well to bear in mind that respondent was attending a medical school where competence in clinical courses are as much a prerequisite to graduation as satisfactory grades in other courses. Respondent was dismissed because she was as deficient in her clinical work as she was proficient in the "book-learning" portion of the curriculum. Evaluation of her performance in the former area is no less an "academic" judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.

435 U.S., at 98 (Powell, J. concurring.)

The essential function of a college or university is the design and implementation of the academic program. Such a program is derived from an evaluation of institutional objectives and goals as well as from the perception of faculty and administration as to the necessary substance and methodology to be embodied in specific courses of study. As can be expected in an autonomous system of higher education, a healthy diversity exists in programs of study which by title appear to be identical. Judicial involvement in academic determination of what is or is not essential to an academic program of study would seriously reduce and hamper the ability, and perhaps motivation, of educators to experiment or innovate a course and program offerings, thus placing a chill on one of the essential functions of the educational community.

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[13] In this connection Mr. Justice Frankfurter has stated:

> . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

II.

SECTION 504 DOES NOT REQUIRE AN INSTITUTION OF HIGHER EDUCATION TO MODIFY ESSENTIAL ELEMENTS OF ITS EDUCATIONAL PROGRAM OR TO PROVIDE COSTLY SPECIAL SERVICES TO COMPENSATE FOR THE DISABILITY OF A PARTICULAR HANDICAPPED STUDENT.

A. Section 504 Does Not Require Modification of an Academic Program To Eliminate Requirements That Are Essential to the Program.

The court of appeals below held that the district court erred by failing to consider that Petitioner could be required to modify its nursing program to accommodate Respondent. The amici contends that there is no such requirement in section 504 and that the HEW regulations do not require modification of a program to eliminate academic requirements which are essential to the program being pursued by the student.

By its terms, section 504 is a nondiscrimination statute, not an affirmative action statute. The language of section 504 – which speaks only in terms of exclusion, denial of benefits, and discrimination – is to be contrasted with the language of section 503 – which speaks in terms of affirmative action.[14] Two points are significant about the language of the two sections. First, section 503 is writen explicitly in terms of affirmative action, implying that section 504, which is written only in terms of nondiscrimination, was not intended to require affirmative action. Second, the affirmative action provision of section 503 applies to qualified handicapped individuals, so that, if an affirmative action requirement somehow were to be read into section 504, the requirement should not go so far as to require a federal aid recipient to take affirmative steps to aid an unqualified person, such as Respondent was found to be by the district court.[15]

The amici do not dispute that the principle of nondiscrimination might in some cases require reasonable accommodations to a *qualified* handicapped individual. For example, one can easily envision situations where a mechanical aid or other device might be used to overcome the effect of a particular disability, and the school

[14] Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, provides in pertinent part:

> Any contract in excess of $2500 entered into by any Federal department or agency . . . shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals. . . .

[15] The legislative history of the Rehabilitation Act of 1973, and of the Rehabilitation Act Amendments of 1974, likewise make clear that Congress perceived section 503 as an affirmative action statute and section 504 as a nondiscrimination statute. *See* S. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 2076, at 2123, 2143, *and* S. Rep. No. 93-1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373, at 6388, 6390, 6413. Typical of the legislative history's references to the two sections is as follows:

> The principal application of this new definition [of "hand capped individual" contained in 29 U.S.C. § 706(6)] would be to . . . the affirmative action program under Federal contracts, as set forth in section 503 . . . and the prohibition against discrimination against qualified handicapped individuals under Federally assisted programs or activities, as set forth in section 504.

S. Rep. No. 92-1297, *id.*, [1974] U.S. Code Cong. & Ad. News at 6413. It is interesting to note that, in describing section 504, Congress used the phrase "against qualified handicapped individuals" rather than "otherwise qualified." As argued in part, I.C., *supra*, it is the amici's position, like that of HEW, that the two terms are interchangeable and that the mere word "otherwise" in section 504 was not intended to mean that a federal aid recipient must waive qualifications for program admission which are essential to participation in the program.

should not interfere with or preclude the use of such devices. In other cases, where an individual's disability does not preclude her from completing the essential requirements of the program of study, the school might alter or allow substitutions for nonessential (although generally required) elements of the program which the individual otherwise could not satisfy, in order to allow completion of the overall program. In the instant case, however, the district court found that Respondent "would be unable to perform in the program even with an improved hearing aid" and there were essential elements of the clinical program (operating room, intensive care unit, post-natal care unit, one on one situations with doctors and patients) for which Respondent was not qualified. *Davis, supra,* 424 F.Supp. at 1343.

That section 504 does not compel schools to alter essential curriculum requirements to facilitate the admission and participation of an unqualified handicapped student is underscored by the HEW regulations, which provide:

> A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. *Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirements will not be regarded as discriminatory within the meaning of this section.* Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

45 C.F.R. §84.44(a)(1978), 42 Fed. Reg. 22684 (1978) (emphasis supplied). Thus, even HEW, which did read some affirmative action requirements into section 504,[16] did not go so far as the court of appeals below in holding that Petitioner might have to modify its nursing program to accommodate Respondent, without regard to the fact, found by the district court, that Respondent's handicap prevented her from participating in activities necessary to Petitioner's nursing program and to licensing requirements which the program seeks to prepare students for.

B. Section 504 Does Not Require an Educational Institution, at Its Own Expense, to Provide Special Services to an Individual Handicapped Person Without Regard to the Financial Consequences to the School of Such Action.

1. Neither the plain language of nor the legislative history behind section 504 requires a school affirmatively to provide special services.

In addition to holding that section 504 requires a federal aid recipient to alter necessary elements of its educational program to accommodate the needs of an applicant not qualified for the program as currently structured, the court of appeals also required the district court to consider 45 C.F.R. §84.44(d)(1), which requires a school to provide auxiliary aids, including interpreters for the deaf, to handicapped students. The court noted that application of the regulation would be appropriate without regard to the expense caused thereby to the school. *Davis, supra,* 574 F.2d at 1162. The court's lack of concern for the financial consequences of the regulation reflects that of HEW:

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[16] *See,* part II.B., *infra.*

> [E]nding discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemptions from section 504 or this regulation: Congress' mandate to end discrimination is clear.

42 Fed. Reg. 22676 (May 3, 1977). The amici agree that the mandate to end discrimination is clear. The question, however, is whether the HEW regulations properly concluded that section 504 also includes a mandate that schools, at their own expense, provide special services to accommodate qualified handicapped students.

The considerations argued in Part II.A., *supra,* regarding the plain meaning of and legislative history behind section 504, are equally applicable here and compel the conclusion that section 504, being specifically a nondiscrimination statute and not (like section 503) an affirmative action statute, does not require schools affirmatively to provide special services to the handicapped.

2. The HEW regulations requiring a school affirmatively to provide specialized services, at the school's expense, go beyond the purpose of the Rehabilitation Act.

To the extent the HEW regulations require schools to use their limited resources to pay for whatever auxiliary aid a particular handicapped student needs to overcome the effects of his or her handicap, they are not entitled to judicial deference in interpreting section 504. In *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), a case involving the anti-discrimination provisions of title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, plaintiff relied heavily upon certain Equal Employment Opportunity Commission guidelines interpreting title VII. The Court rejected the Equal Employment Opportunity Commission's interpretation, stating:

> In evaluating this contention it should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. This does not mean that EEOC Guidelines are not entitled to consideration in determining legislative intent. But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability.

Id., 429 U.S. at 141. Since section 504 does not contain a delegation of authority to HEW to make binding regulations and since Ex. Order 11914 authorizes HEW only to establish standards for defining who are handicapped individuals and what are discriminatory practices, the regulations are entitled to little weight where they go beyond their delegated authority and purport to impose affirmative action requirements.

The Rehabilitation Act of 1973, 29 U.S.C. §701 *et. seq.*, as amended by the Rehabilitation Act Amendments of 1974, contains five subchapters: The first three (29 U.S.C. §§701-776) provide for federally financed programs to assist the handicapped in a variety of contexts. Subchapter IV (29 U.S.C. §§780-787) provides for administration and evaluation of the various programs established in Subchapters I through III. Subchapter V (29 U.S.C. §§790-794) contains "miscellaneous provisions," among them section 503 (dealing with affirmative action in employment under federal contracts), and section 504 (dealing with nondiscrimination under federal grants).

Section 504 does not by its terms provide that recipients of federal financial assistance are to provide special services for the handicapped. On the other hand, subchapters I through III of the Act are replete with programs providing special services to the handicapped and financing, with federal funds, the provision of such services.[17] Accordingly, it seems clear that Congress did not intend in section 504 to shift to educational institutions the financial responsibility for providing special services to the handicapped. Congress knew how to require state agencies and other institutions receiving direct federal aid to provide interpreters to the deaf, and had it intended for all recipients of federal assistance to provide such services pursuant to section 504, it would have done so.

3. If an affirmative action component is to be read into section 504, it should be limited to a school's only having to make reasonable accommodations short of undue hardship to provide specialized services.

In *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), the Court addressed the extent to which title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), requires an employer to take efforts to accommodate an employee whose religious beliefs prohibit him from working on Saturday. The statute forbade religious discrimination and required an employer to make "reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Id.*, 432 U.S. at 74. In interpreting the phrases

[17] In fact the provision of interpreters to the deaf is specifically covered by 29 U.S.C. § 723(6).

"reasonable accommodation" and "undue hardship," the Court concluded that an employer would not be required to treat different employees unequally and that the employer need not "bear more than de minimis cost in order to" accommodate the employee. *Id.*, 432 U.S. at 81, 84.

It is true that *Hardison* involved a statute that explicitly contained a requirement limiting an employer's reasonable accommodation obligations to those that result in no undue hardship, unlike section 504. However, it also is true that section 504 does not even contain a requirement that a school make any reasonable accommodation, unlike the statute in *Hardison.* The amici submit that, if the Court is to read an affirmative action provision into section 504 requiring schools to accommodate qualified handicapped students, the provision should be limited to reasonable accommodations that do not impose an undue hardship on the school.

The court of appeals below felt that expense was not a factor in determining the extent of a school's purported obligation to provide special services, *Davis, supra,* 574 F.2d at 1162, and the HEW comments accompanying the regulations specifically note that "burdens and costs" do not limit a school's obligations, 42 Fed. Reg. 22676 (1977). Nonetheless the language of 45 C.F.R. §84.44 (d)(1), when read in connection with the "solely by reason of his handicap" language of section 504, supports a "reasonable accommodation without undue hardship" standard. The regulation provides:

> (1) A recipient . . . shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination . . . because of the absence of educational auxiliary aids. . . .

> (2) Auxiliary aids may include . . . interpreters or other effective methods of making orally deliverable materials available to students with hearing disabilities.

It would seem to be a reasonable interpretation of the above language, when read in conjunction with the language "solely by reason of his handicap" in section 504 that a school which does not discriminate against the handicapped in admissions would be in compliance with the regulation if it took all reasonable steps to acquire auxiliary aids for a handicapped student from the local state vocational rehabilitation agency which, pursuant to federal statute, exists to provide such services for the handicapped. It would also seem reasonable to conclude that a school would satisfy its obligation if it fairly determined that the handicapped individual could herself afford to purchase or secure the needed auxiliary aid. It would also seem reasonable that a school would have taken "such steps as are necessary" if it fairly determined that financial considerations prohibit it from supplying the auxiliary aid.[18]

Accordingly, a school admitting a qualified handicapped student at most should be required, with respect to the provision of special services to compensate for a particular student's disability, to make reasonable accommodations to the disability without incurring undue hardship.

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[18] For example, in *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977), the cost of college's providing an interpreter for the deaf plaintiff exceeded the amount of the plaintiff's tuition.

CONCLUSION

For the reasons given above, the judgment of the court of appeals should be reversed. The amici urge the Court to hold that section 504 prohibits discrimination against individuals who are qualified for an academic program *in spite of their* handicap, and that section 504 does not affirmatively require a school to modify its academic requirements or to provide special services to compensate for a particular student's disability. If the court concludes that section 504 does require modification of programs or the provision of special services, then the requirement should be limited to the school's making reasonable accommodations that do not result in undue hardship to the school and do not invade the school's fundamental right to determine the content of its own curriculum.

Respectfully submitted,

RICHARD A. FULTON
DAVID M. DORSEN
SACHS, GREENEBAUM & TAYLER
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 872-9090

Attorneys for the National Institute for Independent Colleges and Universities, the Association of American Universities, the American Association of State Colleges and Universities, and the Association of Governing Boards

Of Counsel:

CHRISTINE YOUNG TOPPING
1717 Massachusetts Ave., N.W.
Washington, D.C. 20036

THOMAS HYLDEN
1620 Eye Street, N.W.
Washington, D.C. 20006